

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>SHARON K. HORN</b>	)	
Claimant	)	
VS.	)	
	)	
<b>LYLE'S FOODTOWN</b>	)	Docket No. 1,016,916
Respondent	)	
AND	)	
	)	
<b>BENCHMARK INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh dated August 11, 2004. Claimant was awarded benefits after the Administrative Law Judge (ALJ) determined that claimant had proved that she suffered accidental injury arising out of and in the course of her employment.

**ISSUES**

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment?
- (2) Did the ALJ err in awarding claimant medical treatment for claimant's alleged low back injury?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant alleged that she suffered accidental injury in early March 2004, when, while lifting meat trays weighing 20 to 30 pounds, she suffered an injury to her low back. Claimant, a meat department worker with respondent for approximately seven months, testified that when the back pain started, she advised her boss, Ed Doty, of the back pain and also advised him that the pain came from lifting trays of meat. Mr. Doty did not testify

in this matter. Claimant also testified that she later advised David Meyers, respondent's bookkeeper, that she needed medical treatment in the form of x-rays and that the x-rays had been refused by the insurance company when they denied the claim. Mr. Meyers also did not testify in this matter.

Claimant first went to Stephen J. Bazzano, D.O., her family doctor, complaining of back pain. It is noted in the March 4, 2004 office note that claimant did not advise Dr. Bazzano of any work-related connection to her back complaints. Additionally, respondent provided the testimony of Sheena Essig, respondent's assistant manager, who worked alongside of claimant. Ms. Essig testified that when she noticed claimant was having back difficulties, she asked claimant if it was work related. Ms. Essig testified that claimant denied a work-related connection, indicating that she had injured her back carrying one of her grandchildren while her other grandchild was in the hospital undergoing surgery. Ms. Essig, however, did testify that claimant returned to work and that her back possibly worsened while performing lifting duties for respondent. Claimant returned to work March 5, 2004, after initially being off to go to the doctor and only lasted one to two hours. This was the last day claimant was present at respondent's employment. Ms. Essig testified that claimant at that time said her back was hurting and claimant left work shortly after.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> In workers compensation litigation, the work duties of an employee do not need to cause the work-related condition, but may merely aggravate a preexisting condition and still be compensable.<sup>2</sup>

In this instance, there is conflict regarding whether claimant injured her back at work or whether she injured it lifting a grandchild. As neither Mr. Doty nor Mr. Meyers testified, claimant's comments regarding her conversations with them will be taken as accurate for the purpose of this decision. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>3</sup>

The Board acknowledges the testimony of Ms. Essig does call into question claimant's conversation regarding how her initial back complaints started. However, even Ms. Essig acknowledged that claimant's condition appeared to worsen as she performed

---

<sup>1</sup> K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

<sup>2</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

<sup>3</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

her lifting duties for respondent. An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.<sup>4</sup>

For purposes of this preliminary hearing, the Board finds that claimant has met her burden of proof in showing that she suffered accidental injury arising out of and in the course of employment.

Preliminary hearing findings are not binding upon a full hearing on the claim, but are subject to a full presentation of facts. The Board expects that the questions raised regarding the information provided by claimant to the various employees of respondent will be clarified by the time this matter reaches regular hearing.

Respondent also contends that the ALJ erred in awarding medical treatment for claimant's alleged low back injury. However, the awarding of medical treatment is not an issue which can be appealed from a preliminary hearing pursuant to K.S.A. 44-534a and K.S.A. 2003 Supp. 44-551. The Board, therefore, finds that the appeal of that issue should be dismissed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated August 11, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2004.

---

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Victor B. Finkelstein, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

---

<sup>4</sup> *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).